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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

HECTOR DEAN BARBA, JR.,

Defendant and Appellant.

E062935

(Super.Ct.No. SWF1301283)

OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge.

Affirmed.

Thea Greenhalgh, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Hector Dean Barba pled guilty to one count of first degree burglary (Pen. Code¹ §§ 459, 460, subd. (a), count 1) and one count of second degree burglary (§§ 459, 460, subd. (b), count 2).²

The trial court sentenced defendant to a total term of two years eight months: the low term of two years on count 1, plus one-third of the two-year midterm on count 2, to run consecutively.

On appeal, defendant argues the trial court erred by denying his petition for a recall of sentence and resentencing under section 1170.18, which was added to the Penal Code by the California electorate's passage of Proposition 47. Defendant further contends the record of conviction is silent to the extent we should presume the offense at issue is eligible for resentencing under Proposition 47. We disagree, and affirm the trial court's denial of defendant's petition.

FACTUAL AND PROCEDURAL BACKGROUND

On October 30, 2013, the People filed an information, alleging in count 1 defendant had earlier that year burglarized an "inhabited dwelling house" in Lake Elsinore. The information further alleged in count 2 that defendant then burglarized a Lake Elsinore jewelry store by entering it "with intent to commit theft and a felony."

On October 14, 2014, defendant pled guilty to these two counts. As a factual basis for count 1, the trial court found defendant had entered an inhabited dwelling house

¹ All further statutory references are to the Penal Code, unless otherwise noted.

² A third count, receiving stolen property (§ 496), was dismissed.

within the meaning of the burglary statute, and so had committed a “residential burglary.” As a factual basis for count 2, defendant denied entering the jewelry store to commit “a theft” as alleged in the information, leading the trial court to find defendant had committed a commercial burglary by entering the jewelry store “with intent to commit a felony.”

On November 26, 2014, defendant filed a petition for a recall of sentence and resentencing pursuant to section 1170.18. In that petition, defendant indicated he was seeking to have his conviction on count 2 for “Penal Code § 459 2nd Degree Burglary” recalled and resentenced as a misdemeanor. The People filed an opposition, noting defendant had filed a petition “on felony count(s) 01, 02,” and that he was not entitled to resentencing on the following grounds: “non-qualifying felony (1st 459) & non-commercial establishment.”

On January 13, 2015, the trial court issued an order denying defendant’s petition on the following grounds: “459-1, 459-2—(Jewelry store to sell stolen jewelry) not qualifying felonies.” Defendant appealed as to count 2.

DISCUSSION

We note defendant first argues the trial court erred by finding his first degree burglary conviction was a disqualifying offense rendering him ineligible for Proposition 47 relief. We disagree with defendant’s characterization of the record. The trial court did not find defendant was disqualified from Proposition 47 relief due to his first degree burglary conviction. Rather, the record reveals the trial court thought defendant was applying for Proposition 47 relief on his first degree *and* second degree burglary

convictions, and simply (as well as correctly) found first degree burglary was a *nonqualifying* offense not reached by Proposition 47 rather than a *disqualifying* offense completely precluding defendant from Proposition 47 relief.

Defendant argues primarily that the trial court erred by determining he was not eligible for resentencing relief on his second degree burglary conviction in count 2. We disagree.

Section 1170.18 permits a defendant currently serving a felony sentence to petition a trial court for a recall of that sentence and for resentencing in accordance with new provisions found in certain added or amended offenses. Proposition 47 added to the Penal Code the new misdemeanor offense of shoplifting. (§ 459.5.) A defendant currently serving a sentence for nonresidential, second degree burglary (§ 460, subd. (b)) may now be resentenced to misdemeanor shoplifting, provided the defendant entered the commercial establishment at issue “with intent to commit larceny” (§ 459.5, subd. (a).) Any other entry remains a burglary. (*Ibid.*)³ This resentencing determination is limited to the record of conviction. (See *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1338 [Proposition 36 eligibility determination limited to record of conviction].)

³ Section 459.5, subdivision (a) reads in full: “Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950). Any other entry into a commercial establishment with intent to commit larceny is burglary. Shoplifting shall be punished as a misdemeanor, except that a person with one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290 may be punished pursuant to subdivision (h) of Section 1170.

The record of conviction includes a reporter’s transcript of a guilty plea hearing. (See *People v. Reed* (1996) 13 Cal.4th 217, 222-223 [historical discussion of materials to be used in determining whether prior conviction was for “serious felony”]; *People v. Sohal* (1997) 53 Cal.App.4th 911, 915 [record of conviction includes reporter’s transcript of plea in determining nature of prior conviction].) To the extent a defendant’s initial resentencing eligibility determination requires an appellate court to interpret the statutory provisions of Proposition 47, it presents a question of law we review de novo. (E.g., *People v. Martinez* (2014) 226 Cal.App.4th 1169, 1181.)

Here, defendant was serving a subordinate one-third the midterm consecutive eight-month sentence for second degree burglary. According to the trial court’s order, the trial court denied defendant’s resentencing petition with the note: “459-1, 459-2—(Jewelry store to sell stolen jewelry) not qualifying felonies.” We infer from this note the trial court found the second degree burglary conviction nonqualifying because the intent upon entry into the jewelry store was not to commit larceny as required by section 459.5, but rather “to sell stolen jewelry.” This inference—or, at least, the inference defendant entered the jewelry store with an intent *different* from the intent to commit larceny—is supported by the reporter’s transcript of the guilty plea proceedings. Defendant expressly denied entering the jewelry store with intent to commit “a theft,” a denial with which the trial court agreed. The trial court found defendant entered the jewelry store “with intent to commit a felony,” and defendant pled guilty to the offense on that factual basis. Thus, as revealed in the record of conviction, defendant’s intent in committing the second

degree commercial burglary at issue does not match the theft-related intent required to be resentenced to misdemeanor shoplifting in accordance with section 459.5.

Defendant contends his conviction on count 2 should be resentenced as misdemeanor shoplifting in accordance with section 459.5, because the state of the record favors that determination. Specifically, defendant contends the record of conviction is “silent” in that it does not “disclose any facts of the commercial burglary committed other than it was of a commercial establishment.” For that reason, defendant presses, we should indulge the presumption that the conviction on count 2 was “for the least punishable offense,” which, under Proposition 47, would have been misdemeanor shoplifting. We disagree.

As our discussion *ante* illustrates, the record of conviction before us is sufficiently clear to reveal that count 2 was based on an entry into a jewelry store to commit an offense *other* than a larceny. By its plain terms, section 459.5 left unaffected such burglarious entries into commercial establishments.

In sum, the trial court did not err in concluding defendant’s conviction on count 2 was ineligible for relief because the shoplifting statute contemplates only an entry into a commercial establishment with the intent to commit larceny, and the record reveals the factual basis for defendant’s plea was that he entered such an establishment with a *different*—and thus nonqualifying—intent to commit a nontheft felony.

DISPOSITION

The judgment of the trial court is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

CODRINGTON
J.